

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Oreg & affidavit
mailing*

77-1081

To be argued by
ZACHARY W. CARTER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1081

UNITED STATES OF AMERICA,

Appellee,

—against—

ALEXANDER GELFAND,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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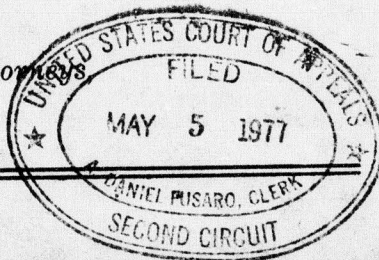


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UNITED STATES OF AMERICA,

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—against—

ALEXANDER GELFAND,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant, Alexander Gelfand, appeals from a judgment of conviction entered on January 21, 1977 after a jury trial in the United States District Court for the Eastern District of New York (Weinstein, J.), which judgment convicted appellant of three counts of receiving and accepting sums of money from various federally inspected meat packing companies during the course of his employment as a United States Department of Agriculture meat inspector, in violation of Title 21, United States Code, Section 622. Appellant was sentenced to concurrent terms of one year and one day imprisonment¹ on each count and was required to pay a fine of \$7500. Appellant is presently free on bail pending appeal.

¹ Appellant was acquitted of count one of the four count indictment.

On this appeal, appellant alleges: (1) that there was no substantial evidence to sustain his conviction; (2) that there was insufficient evidence to permit the case to go to the jury; and (3) that Title 21, United States Code, Section 622 is unconstitutional.

Statement of Facts

A. The Government's Case

As a result of the enactment of the Federal Meat Inspection Act of 1907, meat packing companies doing business in interstate commerce are required to apply for, and obtain, daily federal inspection from the Department of Agriculture. Under the Act, a federal meat inspector engages in a daily examination of an establishment's operation. Such monitoring includes the evaluation of a company's on-going program of sanitation, and the taking of remedial action where appropriate. The Government's case consisted, in the main, of the testimony of representatives of five federally inspected meat packing companies who had paid the appellant, a United States Department of Agriculture meat inspector, varying amounts of money during the period of his assignment at those establishments.²

² Since appellant was acquitted of count one of the indictment, only the testimony of company representatives affecting counts two through four will be discussed below.

Appellant conceded, and the parties so stipulated, that during the time periods set forth in each count of the indictment appellant was a United States Department of Agriculture meat inspector and had been assigned inspection responsibilities at Paulus Packing Company; J. and N. Vorcheimer, Incorporated; Cumberland Provisions, Incorporated; and AAA Meat Provisions, Incorporated. In addition, appellant's time and attendance records, which were signed by appellant and which established the above-mentioned stipulated facts, were also received in evidence. (117-122).

The testimony of the Government's witnesses disclosed that there had existed for many years a system of corruption, regrettably involving the overwhelming majority of meat inspectors assigned to inspect the cluster of meat packing establishments located in the Fort Greene area of Brooklyn. The system was based upon the threat of harassment of those companies by the inspectors who enjoyed tremendous power over the day to day operation of the plants. The bolder and more demanding inspectors indulged in various forms of harassment, differing from establishment to establishment, but generally having the effect of slowing down or stopping a particular plant's operation. Presented with the inspectors' ability to utilize their prerogatives in such a manner, and in response to subtle suggestions that the harassment could be discontinued for a price, the operators of the packing companies would begin to pay those inspectors, who would accept it, varying sums of money on a weekly basis over the period during which the inspectors were assigned at their various plants. While inspectors would continue to properly point out and require correction of various deficiencies that would be disclosed by their inspection even after the companies would begin making payments, the inspectors would no longer indulge in such practices as pointing out or "tagging" deficiencies and then disappearing for long periods, remaining conspicuously unavailable to inspect the corrected item so that the plant's work could resume.³ (9-11, 48-49, 83, 106-107). Not all of the inspectors who accepted payments participated in the overt acts of harassment but, like appellant,

³ "Tagging" is a procedure whereby an inspector prevents a company from using a particular piece of equipment or an area of its premises until some deficiency, usually a sanitation problem is corrected. This is accomplished by the placing of a tag on the equipment or a string across a doorway. When the inspector determines that the condition has been corrected, the tag or string is removed and operations may resume.

merely benefited from the corrupt system which had been created and perpetuated by those who did.

Harry Buxbaum, president of Cumberland Provisions, Incorporated, identified appellant and testified that while appellant was assigned as an inspector to his plant, that he had personally paid him between twenty and fifty dollars weekly, generally on Fridays. (7, 13, 22). Buxbaum did not recall the exact dates on which he paid appellant and he stated that appellant had been assigned as an inspector to his company some three or four times, in addition to, and previous to the period between July 29 and August 22, 1975, alleged in the indictment. (19, 24, 40). According to Buxbaum, however, he invariably paid appellant whenever he was assigned to Cumberland Provisions, Incorporated (40).

Arthur Vorchheimer, who along with his father and brother owned J. and N. Vorchheimer, Incorporated, also testified that he paid appellant weekly, usually on Thursday or Friday, during the course of his assignment as an inspector to the Vorchheimer plant. (45) According to Vorchheimer, appellant would approach him with the inquiry, "you want to see me now or later," which Vorchheimer understood, in the context of the ongoing system, to mean that appellant wanted to be paid. Vorchheimer further testified that appellant never refused these payments (46). Vorchheimer, like Buxbaum, while uncertain about the precise number of times he paid appellant, testified that he invariably paid appellant whenever he was assigned to the Vorchheimer plant. (51)

Leon Katz, president of AAA Meat Provisions, Incorporated, also identified appellant as an inspector whom he had paid during the period that appellant was assigned to AAA Meat Provisions. (80). Like the representatives of the other companies, Katz recalled that he

paid appellant every week that he was assigned as a full-time inspector at the AAA plant. (81-82, 90). In addition, Katz was able to specifically recall that he had paid appellant during the period between August 3 and September 1975. (85).

Jack Bornstein, owner of Bornstein Bros., Incorporated, another meat packing company, was called to testify to similar acts of misconduct. He, too, identified appellant as an inspector whom he had paid whenever he (appellant) was assigned to the Bornstein plant. (105).⁴

⁴ It was stipulated by the parties that, if called upon to testify, an appropriate representative of the Department of Agriculture would identify certain of Department of Agriculture records including appellant's signed oath of office which he took upon his appointment as a United States Department of Agriculture Meat Inspector (Exh. 1); a two page description of appellant's job and responsibilities (Exh. 2); and records establishing that each of the meat companies whose representatives testified had sought and received federal inspection. (Exh. 6, 7, 8, 9 and 12).

It was also stipulated that if called as a witness, Harry Wood, Finance Manager in the Philadelphia office of the Department of Agriculture, would testify that appellant was required every two weeks to fill out and sign a time and attendance record showing the places he worked during that two week period as well as the number of hours that he worked. Wood would further testify that a time and attendance bulletin (Exh. 4) directs meat inspectors to list on the back of the time and attendance record the Department of Agriculture establishment numbers of the companies where the inspector worked during the two week period. Further, Wood would identify appellant's time and attendance records for the period beginning January 1973 through the year 1975, which established that appellant was assigned to J. and N. Vorchheimer, Incorporated, for a period of time between July 28 and August 23, 1975; to Cumberland Provision, Incorporated for a period of time between July 29, and August 23, 1975; and to AAA Meat Provisions, Incorporated, for a period of time between August 3 and September 27, 1975.

Wood would also identify a booklet entitled, *Employee Responsibility and Conduct* (41) and two documents, signed by appellant, in which he acknowledged having read and discussed with his supervisor the regulations contained in the booklet.

B. The Defense Case

Appellant, who chose not to testify, called Anthony Perna, the operator of a meat packing company in the Fort Greene area to testify on his behalf. Perna testified that while he had made illegal payments to other meat inspectors who had been assigned to his plant, he had never made such payments to appellant. Perna went on to testify, however, that appellant had only been assigned to his plant as a "relief" man, working at his establishment as little as one day out of an entire week and that it was the practice of the meat companies not to pay inspectors who were so assigned only as relief men.

ARGUMENT

POINT I

There Was Sufficient Evidence To Support Appellant's Conviction.

Appellant contends that there was insufficient evidence to sustain his conviction because the Government's witnesses could not fix with certainty the dates on which they paid appellant or the exact amounts paid.

Viewing the evidence in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Marrapese*, 486 F. 2d 918, 921 (2d Cir. 1973), *cert denied*, 415 U.S. 994 (1974), it is clear that there was more than sufficient evidence on the basis of which a reasonable juror could have found appellant guilty. *United States v. Rivera*, 513 F.2d 519, 528-530 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975); *United States v. Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States v. Taylor*, 464 F.2d 240, 243-245

(2d Cir. 1972); *United States v. Falcone*,— F.2d —Slip op. 345, 350-351 (2d Cir. November 1, 1976).

The testimony of each of the Government's witnesses is set forth more fully in the Statement of Facts, *supra*. But the essence of the evidence was that whenever appellant was assigned as a Department of Agriculture meat inspector to the particular meat packing plant about which testimony was received, he was invariably paid-off on a weekly basis. The Government was unable to establish, through testimony of the meat company representatives, the exact dates that the payments were made. Indeed, the companies kept no records of the assignments of the various inspectors. (101). But the Government did establish, through the signed time and attendance records of appellant, that he was, in fact, assigned and did report to these particular meat companies during the critical time periods. Obviously, if the jury believed that each and every time appellant was assigned to the companies mentioned in the indictment he was paid, then they had to conclude, on the basis of these time and attendance records that appellant must have also been paid during the time periods alleged in the indictment.

Accordingly, appellant's claim in this regard is frivolous.⁵

⁵ Each and every element of the offense, *United States v. Seuss*, 474 F.2d 385 (1st Cir.), *cert. denied*, 412 U.S. 928 (1973), was established by the evidence. *Seuss* is discussed more fully under Point II.

POINT II**Title 21, United States Code, Section 622 Is Constitutional.**

Appellant challenges the constitutionality of Title 21, United States Code, Section 622 on three grounds. First, appellant claims that the statute, which he characterizes as "draconian", by its terms denies those to whom it applies the presumption of innocence normally accorded defendants in a criminal trial. Secondly, appellant claims that the statute, by singling out Department of Agriculture meat inspectors, denies them equal protection of the law. Lastly, appellant contends that the statute is unconstitutionally vague. We submit that each of appellant's claims is without merit.

Title 21, United States Code, Section 622 provides in pertinent part:

" . . . [A]ny inspector, deputy inspector, chief inspector, or other officer or employee of the United States authorized to perform any of the duties prescribed by this subchapter. . . who shall receive or accept from any person, firm, or corporation engaged in commerce any gift, money, or other thing of value, given with any purpose or intent whatsoever, shall be deemed guilty of a felony and shall, upon conviction thereof, be summarily discharged from office and shall be punished by a fine not less than \$1,000 nor more than \$10,000 and by imprisonment not less than one year nor more than three years."

While the Court of Appeals for the Second Circuit has not been called upon to construe the statute, the First Circuit has. In *United States v. Seuss*, 474 F.2d

385 (1st Cir.), *cert. denied*, 412 U.S. 928 (1973), essentially the same arguments advanced by appellant were there explored and rejected. In *Seuss* the Court framed the appellant's contentions this way:

"Appellant raises a sophisticated vagueness claim. He admits that the words of the statute are perfectly clear—receiving a thing of value from a person, firm, or corporation engaged in interstate commerce. But he claims that they are so broad—e.g., covering birthday gifts hand-delivered by a mother who lives in New Hampshire to her son living in Massachusetts and promotional mailings that include free pencils, calendars or the like—that Congress could not have intended to prohibit all matters literally covered. Thus, he concludes an inspector has no way of knowing exactly which receipts are banned and which permissible." *Id.* at 387.

In responding to this vagueness argument, the Court held:

"First, and most significantly, we think it clear that the statute prohibits the officials authorized to perform the prescribed inspection duties from accepting things of value in connection with or arising out of the performance of their official duties. This common sense interpretation stems first from consideration of the legislative purpose. The Meat Inspection Act of 1907, 34 Stat. 1264, passed in response to the unsanitary conditions in the meat packing industry, revealed in Upton Sinclair's expose, "The Jungle", was designed to insure that meat products sold to the consumer be clean and safe. A system of federal inspection was created and the inspectors subjected to strict regulation lest their corruption—or the appear-

ance of it—undermine the quality of meat or the public's trust in their supervision of meat quality." *Id.* at 388.

Stressing again the common sense interpretation of the statute to be gleaned from the obvious legislative purpose, the Court stated:

"Congress could not have thought that inspectors would be less rigorous in their scrutiny, nor the public less certain of their diligence, because they received birthday gifts from members of their family." *Id.* at 388.

It is quite apparent that the *Seuss* court did not rely, as appellant suggests, upon Department of Agriculture regulations promulgated subsequent to the enactment of the statute in order to determine its meaning, but rather upon the history of the development of the legislation and the common sense meaning of its terms.⁶ The Court did, however, cite the Department's regulations to demonstrate that the statute was received without any misunderstanding about the clear import of its terms. The Court stated:

"This self-evident construction of Congressional intent is reflected in the Department's personnel

⁶ Indeed the Court specifically stated:

"Although the regulations specifically direct each employee's attention to all the statutory provisions, including the instant one, relevant to their duties, § 0.735-24, we need not rest on these regulations, which are part of an internal personnel manual designed primarily as the basis for departmental disciplinary proceedings, see § 0.735-5, as the definitive construction of this criminal statute. See *Champion Refining Co. v. Corporation Comm'n of Okl.*, 286 U.S. 210, 242-243 (1932). It is enough to note that the Department has already drawn the basic distinction which we find in the statute."

regulation regarding "Gifts, entertainment and favors" C.F.R. §.0,735-12. The regulation finally proscribes broadly the receipt by an employee of any thing of monetary value from one who (1) "[h]as, or is seeking to obtain, contractual or other . . . financial relations with the Department", (2) "[c]onducts operations or activities that are regulated by the department" or (3) "[h]as interests that may be substantially affected by the performance or nonperformance of [the employee's] duty." Subsection (b) of the regulation then explains that this broad prophylactic rule shall not be interpreted to prohibit:

"(1) Acceptance of any of the usual courtesies in an obvious family or personal relationship (such as those between the employee and his parents, spouse, children, or close personal friends) when the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors,"

* * * * *

or

"(4) The exchange of usual social courtesies which are wholly free of any embarrassing or improper implications." *Id.* at 388-389.⁷

Against the backdrop of the crystal clear meaning of the statute, appellant's claims fall quickly.

⁷ It is important to note that, contrary to appellant's representation at page 15 of his brief, these regulations, which are embodied in the Department's employee manual and which are required reading for all meat inspectors, were received in evidence, without objection, along with a signed acknowledgement from appellant indicating that he had read them. (Exh. 39, 40 and 41).

Appellant complains that Section 662, which requires no specific intent, is a "strict liability" statute, and while conceding the existence and validity of other such statutes, insists that this section somehow deprived appellant of the presumption of innocence. The Court in *Seuss* addressed that issue and commented as follows:

Our interpretation is also supported by 18 U.S.C. §201, the general federal bribery statute and its construction in *United States v. Irwin*, 354 F.2d 192 (2d Cir. 1965), to which defendant refers us to pinpoint what he claims is the inadequacy of the statute before us. In *Irwin*, the court considered §§201 (f) and (g) which prohibit, respectively, the giving to or accepting by a public official of anything of value "for or because of any official act performed or to be performed by such public official". As the court there properly noted, those words, indicating a casual relationship to specific acts, could well be read as requiring a specific intent to alter official conduct. 354 F.2d at 197. *Use of such words in §622, which defendant suggests would provide adequate warning, would, however, destroy the explicit Congressional purpose not to require any intent in [that Part 3 of § 622]. Id. at 389.*

And in footnote 8, at 389, the Court continued:

The absence of a requirement that the government prove intent, either of the donor to influence official conduct, or of the recipient to alter his performance, *does not mean that the statute is one of strict liability.* The receiving or accepting official must, as the indictment stated and the district court instructed, at least do so knowingly—i.e., be aware that the transfer is one of value and the transferor one engaged in interstate commerce.

In the case at bar, each count of the indictment charged appellant with "*wilfully and knowingly*" receiving and accepting money and other things of value from various meat processing companies. Indeed, the court charged the jury as follows:

"You must find that he received the money knowingly and purposefully, and not by accident, mistake, inadvertence, or misunderstanding."
(186).

Moreover, the court, guided by *Seuss*, charged as follows on the elements of the offense:

"Now, in order to find a person guilty under that statute, you have to find three things beyond a reasonable doubt:

First, that the defendant was authorized by the United States to perform meat inspection duties.

Second, that the corporation which allegedly gave him the money was engaged in interstate commerce in the United States and its meat was inspected by the United States Department of Agriculture. . . .

Now the third element. . . is that the defendant did accept money from this corporation *in connection with or arising out of his official duties.*" (emphasis added).

Clearly, the jury was required to find that appellant had criminal intent to receive or accept money or something of value from a meat company, subject to Department of Agriculture inspection, in connection with or arising out of his official duties. Any claim that appellant was denied the presumption of innocence normally accorded defendants in criminal trials is patently frivolous.

Appellant also claims that Title 21, United States Code, Section 622 does violence to equal protection principles. The essence of his claim is that the federal bribery statute, Title 18, United States Code, Section 201, is comprehensive enough to reach the criminal charged in the indictment without resort to Section 622 of Title 21. Hence, by singling out federal meat inspectors as a class of federal officials who are subject to prosecution under Section 622, Congress has created an irrational and arbitrary classification violative of defendant's right to the equal protection of the laws. Appellant suggests that this violation is compounded by the stricter standard of liability under Section 622 and its supposedly more stringent sentencing provisions, relative to those provided under Section 201 of Title 18.

The difficulty with this argument lies in its premise. It is quite apparent that in enacting the Meat Inspection Act of 1907, 34 Stat. 1264, the predecessor of Section 622, Congress was justified in drawing distinctions between federal meat inspectors and all other federal employees. The 1907 Act established a rigorous and pervasive system of regulation of the nationwide meat packing industry. The conditions which caused Congress to act have been previously set forth as recited in *Seuss, supra* at 388, and will not be repeated here. We submit that it is entirely proper for Congress to seek to insure a high level of cleanliness and safety in meat products consumed by the public. Therefore, it is perfectly reasonable to treat those imbued with substantial public trust stricter than other federal employees. Since Section 622 bears a rational relation to the achievement of this legitimate legislative goal, the statute does not offend the equal protection principles inherent in the Fifth Amendment. See, *United States v. Murphy*, 480 F.2d 256 (1st Cir. 1973).

Appellant's reliance upon *Reed v. Reed*, 404 U.S. 71 (1971) is misplaced. In that case it was determined that a state's preference of males over females in the granting of letters of administration violated the equal protection clause of the Fourteenth Amendment. In *Reed*, the Court held:

"A classification must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76.

Here it is readily apparent that Congress, having invested federal meat inspectors with awesome powers, commensurate with their significant responsibilities to safeguard the public, concomitantly required from them a high gradient of integrity, in light of the obvious devastating effect upon the public which could result from their corruption. That the standard to which federal meat inspectors is held is higher than that for other federal employees, is neither irrational nor arbitrary. Accordingly, appellant's claim in this regard is without merit.

Finally, appellant contends that Section 622 is unconstitutional in that, by its terms, it would seem to prohibit conduct that Congress could not have sought to regulate. Therefore, it is suggested, that since an inspector such as appellant cannot determine what conduct is impermissible, the statute is unconstitutionally vague.

The clear meaning of the statute as set forth in *Seuss* has already been discussed at length above. It is obvious from the foregoing analyses that Section 622 does "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harris*, 347 U.S. 612, 617 (1954).

Moreover, while counsel raises the spector of arbitrariness in enforcement, the almost seventy year history of the statute belies such a notion. Though the non-use of a statute does not mean it could not be subject to future abuse, the few reported cases concerning Section 622 deal with prohibited conduct plainly within its ambit. *United States v. Seuss, supra*; *United States v. Murphy, supra*; *United States v. Forgione*, 487 F.2d 364 (1st Cir. 1973). And it is well settled that one as to whom a statute clearly applies may not challenge the statute's vagueness, if any, as to other marginal cases.

Accordingly, appellant's contention in this regard is without merit.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: May 2, 1977

Respectfully submitted,

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Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK

} ss
DOLORES M. BYRD

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 5th day of May 1977 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

JEROME V. GIOVINAZZO

1086 FOREST AVENUE

STATEN ISLAND, NEW YORK 10310

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

5th day of May 1977

Carolyn N. Johnson
CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-46107-8
Qualified in Queens County
Term Expires March 30, 1979